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IN THE

Supreme Court of the United States

October Term, 1975

NO. 75-1398

CHARLES J. WOLFER and Wife,
KATHRYN WOLFER,
Petitioners

v.

RAYMOND C. THALER and the
CITY OF BRENHAM,
Respondents

Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable Supreme Court of the United States:

STATEMENT OF THE CASE

At all pertinent times made the basis of this lawsuit, Respondent, Raymond C. Thaler, was an employee, to-wit, a police officer, employed by the City of Brenham, Texas, a municipal corporation. On the 22nd day of January, 1971, at approximately 12:10 a.m., the burglar

alarm at the Gilbson's Discount Store on South Day Street in Brenham, Texas, went off. Officer Raymond C. Thaler and another officer of the City of Brenham went to the location of the Gilbson's Discount store. The other officer approached the front door and Officer Raymond C. Thaler went to the back of the store. As he was standing at the back door of the store, a subject later identified as Charles Edward Wolfer, ran out of the back door, wearing a white store apron over his face. Respondent Thaler yelled at him several times to stop, but he kept running from the store. Respondent Thaler fired one shot from a shotgun and the subject fell to the ground.

Upon motion, the trial Judge dismissed the City of Brenham from Petitioners' complaint on the 8th day of April, 1974.

Upon motion, the trial Judge granted Raymond C. Thaler's Motion for Summary Judgment on the 30th day of June, 1975. A copy of the opinion of the trial court is set out in the Appendix, infra.

The United States Court of Appeals for the Fifth Circuit affirmed the opinion of the trial court, which opinion was signed and published in 525 F.2d 977. A copy of the same is set out in the Appendix, infra.

STATEMENT OF COUNTER ISSUES

1. **The Order of the District Court, Dismissing the City of Brenham from Petitioners' Complaint on the 8th Day of April, 1974, Was Proper.**

2. **The Order of the District Court Granting Respondent, Raymond C. Thaler's Motion For Summary Judgment Granted on the 30th Day of June, 1975, Was Proper.**

COUNTER ISSUE 1
(Restated)

1. The Order of the District Court, Dismissing the City of Brenham from Petitioners' Complaint on the 8th Day of April, 1974, Was Proper.

(1) Petitioners' complaint regarded alleged conduct of an officer employed by the City of Brenham, Texas, and jurisdiction was sought over the City of Brenham pursuant to Title 42 U.S.C. Section 1983 and Title 28 U.S.C. Section 1343 (3). Further, injunctive relief was sought under Title 42 U.S.C. Section 1983 and a judgment of declaratory rights of the parties as sought under Title 28 U.S.C. Section 2201.

The City of Brenham is not a person under the various sections referred to in Petitioners' complaint. *City of Kenosha v. Bruno,* 412 U.S. 507 (1973) and numerous other cases sustaining this point.

The Respondent, Raymond C. Thaler, was an employee of the City of Brenham at the time of the alleged wrongdoing and was engaged in a governmental function of the City of Brenham, and the City of Brenham would thus not be liable for the tortuous conduct of its employees. Vernon's Annotated Civil Statutes Art. 6252-19. *Pontarelli v. City of McAllen,* CCA (1971) 465 S.W.2d 804.

COUNTER ISSUE 2
(Restated)

2. The Order of the District Court Granting Respondent, Raymond C. Thaler's Motion For Summary Judgment Granted on the 30th Day of June, 1975, Was Proper.

(1) At all times relevant hereto, Respondent Thaler was a police officer for the City of Brenham, Texas. On January 22, 1971, he received a call that a burglary was in progress at the Gilbson's Discount Store in Brenham, Texas. Upon arrival at the scene, Respondent Thaler stationed himself at the store's back door while another officer entered the front door and arrested one of the burglars. Thereafter, Wolfer ran out of the back door of the Gilbson's Discount Store. Respondent Thaler yelled at Wolfer to stop and when he did not, fired one shot from a shotgun at Wolfer, killing him. Wolfer was unarmed.

All parties agree that the actions of Respondent Raymond C. Thaler were within the scope of the then-existing "justifiable homicide" provision of the Texas Penal Code:

> Homicide is justifiable when inflicted for the purpose of preventing murder, rape, robbery, maiming, disfiguring, castration, arson, burglary and theft at night . . ., whether the homicide be committed by the party about to be injured or by another in his behalf, when the killing takes place under the following circumstances:
>
> * * *
>
> 8. In cases of burglary and theft by night, the homicide is justifiable at any time while the offender is in the building or at the place where the theft is committed, or is within reach of gunshot from such place or building.

TEX. PENAL CODE art. 1222.

All parties agree that Respondent, Raymond C. Thaler, acted in good faith in reliance upon Article 1222, believing his actions to be authorized by a valid, lawful and constitutional statute of the State of Texas. Under these facts, the Respondent cannot be held liable in money

damages under 42 U.S.C. Sec. 1983. *Pierson v. Ray*, 386 U.S. 547 (1967).

Petitioner also sought a declaratory judgment that Article 1222 authorizes an unconstitutional denial of due process of law "in that it authorized . . . and sanctifies with all the force of law . . . the killing of a human being under essentially arbitrary conditions." On the same grounds, Petitioners sought to enjoin enforcement of Article 1222, although there was no request for the convening of a three-judge court pursuant to 28 U.S.C. Sec. 2281, 2284.

A declaratory judgment could resolve no actual controversy as to the legal rights of the litigants. *See Golden v. Zwickler*, 394 U.S. 103 (1969). As already noted, Respondent, Raymond C. Thaler, cannot be held liable for money damages under 42 U.S.C. Sec. 1983. Any claim by Petitioners for wrongful death is maintainable regardless of the validity of Article 1222. *See Howsley v. Gilliam*, 517 S.W.2d 531 (Tex. 1975). Moreover, Respondent, Raymond C. Thaler, a Brenham police officer, hardly has an interest "of sufficient immediacy and reality" *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, in defending the constitutional validity of Article 1222 to establish a "case or controversy" between the parties.

Further, Article 1222 is no longer the law in Texas. The new Texas Penal Code, effective January 1, 1974, substantially modifies the "justifiable homicide" provisions of the old Article 1222. The present Texas Penal Code's Section 9.42 authorizes the use of deadly force against another to protect land or tangible, movable property only when the actor reasonably believes deadly force is immediately necessary:

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(2) (B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property; and

(3) he reasonably believes that:

(A) the land or property cannot be protected or recovered by any other means; or

(B) the use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury.

These qualifications on the justification for use of deadly force materially alter the provisions of Article 1222. Thus, any declaratory judgment as to the constitutionality of Article 1222 would be without significance as to any legal controversy between the parties, or as to the present law of Texas. Likewise, any injunctive relief would only restrain enforcement of a statute which is no longer the law. It would be improper for the Court to issue an abstract decision involving no actual case or controversy.

CONCLUSION

For the reasons given above, a Writ of Certiorari should not be granted.

Respectfully submitted,

R. WILLIAM SPINN, *Attorney for*
Raymond C. Thaler and the
City of Brenham, Texas

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of April, 1976, a copy of the foregoing Brief for Respondents was served upon Kathryn V. Wolfer, Attorney for Petitioners, 2500 Dunstan, Suite 307, Houston, Texas 77005, by mailing a copy of her at such address through the United States mail, postage prepaid.

R. WILLIAM SPINN

APPENDIX A

Charles J. WOLFER and wife, Kathryn Wolfer,

Plaintiffs-Appellants,

v.

Raymond C. Thaler and the City of Brenham,

Defendants-Appellees.

No. 75-3077

Summary Calendar.*

United States Court of Appeals,

Fifth Circuit.

January 7, 1976.

Appeal from the United States District Court for the Western District of Texas.

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

DYER, Circuit Judge:

[1] Appellants are husband and wife who brought suit under 42 U.S.C.A. §1983,[1] against defendant police

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

1. Texas law provides that a death action may be brought on behalf of a child by parents within 3 months of the death or thereafter by the executor or administrator of the deceased, V.A.T.S., art. 4675, and that a cause of action survives the death of a person, V.A.T.S., art. 5525. Under these circumstances, appellants have standing under Section 1983. *Brazier v. Cherry*, 5 Cir. 1961, 293 F.2d 401. *See Mattis v. Schnarr*, 8 Cir. 1974, 502 F.2d 588, 590.

officer Thaler, and the City of Brenham, Thaler's employer. The gravaman of the complaint is that Thaler's fatal shooting of appellants' son while he was attempting to flee from a burglary was an unconstitutional deprivation of their son's life. Appellants seek monetary damages for the loss of their son, a declaratory judgment that the old Texas justifiable homicide statute, V.T.C.A., Penal Code, Art. 1222, under which Thaler acted,[2] is unconstitutional, and an injunction against the enforcement of Art. 1222. The district court dismissed the action against the City of Brenham on the authority of *City of Kenosha v. Bruno*, 1973, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109. It later granted defendant Thaler's motion for summary judgment, on the grounds that (1) defendant Thaler's good faith reliance on the constitutionality of Article 1222 precluded an award of monetary damages under Section 1983,[3] and (2) declaratory relief[4] is unavailable because (a) there is no case or controversy between the parties and (b) Article 1222 has been re-

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2. V.T.C.A., Art. 1222 provided in pertinent part:
Homicide is justifiable when inflicted for the purpose of preventing . . . burglary and theft at night, . . . when the killing takes place under the following circumstances:
* * * *
8. In cases of burglary and theft by night, the homicide is justifiable at any time while the offender is in the building or at the place where the theft is committed, or is within reach of gunshot from such place or building.

3. The district court relied on *Pierson v. Ray*, 1967, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288. Appellants do not challenge this holding. Cf. Theis, "Good Faith" as a Defense to Suits for Police Deprivation of Individual Rights, 59 Minn. L. R. 991, 1011, 1025 (1975).

4. The district court could not have enjoined enforcement of Article 1222. Such an injunction falls under the hegemony of a three-judge court. 28 U.S.C.A. § 2281.

placed by V.T.C.A., Penal Code §9.42[5] so that declaratory relief with respect to Article 1222 would be without significance. Appellants challenge the dismissal of the City and the denial of declaratory relief. We affirm.

[2] Although appellants argue the constitutionality of both the old and new Texas justifiable homicide statutes, that issue is not before us. Since we agree that *Kenosha* required dismissal of the action against the City of Brenham, the sole question is the propriety of delaratory relief.

[3] A declaratory judgment may only be issued in the case of an "actual controversy." 28 U.S.C.A. §2201. That is, under the facts alleged, there must be a substantial controversy of sufficient immediacy and reality between parties having adverse legal interests. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 1941, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826.

[4] No such controversy exists here. Once Thaler is absolved from liability for damages under Section 1983, his interests in the constitutionality of Article 1222 is

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5. The new justifiable homicide statute provides in pertinent part:
A person is justified in using deadly force against another to protect . . . tangible, movable property:
(2) when and to the degree he reasonably believes the deadly force is immediately necessary:
. . . .
(B) to prevent the other who is fleeing immediately after committing burglary . . . from escaping with the property; and
(3) he reasonably believes that:
(A) the . . . property cannot be protected or recovered by any other means; or
(B) the use of force other than deadly force to protect or recover . . . property would expose the actor or another to a substantial risk of death or serious bodily injury.

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no different than appellants or any other citizen of the state of Texas.

Nor is there any immediacy or reality to the alleged controversy. Article 1222 has been supplanted. A declaratory judgment with respect to its constitutionality would be pointless.

Appellants rely heavily on *Mattis v. Schnarr*, 8 Cir. 1974, 502 F.2d 588. On similar facts save one, the *Mattis* court held that defendant police officers had a sufficient adverse interest because (1) a declaratory judgment would define their rights and powers as police officers and (2) they have an interest in assuring that the law governing their official conduct is clear so that they may perform their duties in a constitutional manner. *Id.* at 595.

The distinguishing fact is fatal to reliance on *Mattis:* the Texas law has been amended. Therefore, neither basis offered by *Mattis* creates the necessary "actual controversy."

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

CIVIL ACTION A-72-CA-165

CHARLES J. WOLFER, ET AL.

v.

RAYMOND C. THALER

O R D E R

Came on this day for consideration by the Court Defendants' Motion for Summary Judgment. Plaintiffs have brought this action pursuant to 42 U.S.C. §1983 and 28 U.S.C. §2201, seeking damages and injunctive and declaratory relief arising from the death of their son resulting from gunshot wounds inflicted by Defendant.

At all times relevant hereto Defendant Thaler was a police officer for the City of Brenham, Texas. On January 22, 1971, he received a call that a burglary was in progress at the Gibson Discount Store in Brenham. Upon arrival at the scene, Defendant stationed himself at the store's back door while another officer entered the front door and arrest one of the burglars. Thereafter, Wolfer ran out the backdoor of the Gibson's store. Defendant yelled at Wolfer to stop and, when he did not, fired one shot from his shotgun at Wolfer, killing him. Wolfer was unarmed.

The parties agree that Defendant's actions were within the scope of the then-existing "justifiable homicide" provision of the Texas Penal Code:

> Homicide is justifiable when inflicted for the purpose of preventing murder, rape, robbery, maiming, disfiguring, castration, arson, burglary and theft at night. . . , whether the homicide be committed by the party about to be injured or by another in his behalf, when the killing takes place under the following circumstances:
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> 8. In cases of burglary and theft by night, the homicide is justifiable at any time while the offender is in the building or at the place where the theft is committed, or is within reach of gunshot from such place or building.

TEX. PENAL CODE art. 1222.

Defendant asserts, and Plaintiffs do not deny, that Defendant acted in good faith reliance upon Article 1222, believing his actions to be authorized by a valid, lawful and constitutional statute of the State of Texas. Under these facts Defendant cannot be held liable in money damages under 42 U.S.C. §1983. *Pierson v. Ray*, 386 U.S. 547 (1967).

Plaintiffs, however, also seek a declaratory judgment that Article 1222 authorizes an unconstitutional denial of due process of law "in that it authorized . . . and sanctifies with all the force of law . . . the killing of a human being under essentially arbitrary conditions." Complaint at 4. On the same grounds Plaintiffs seek to enjoin enforcement of Article 1222, although there has been no request for the convening of a three-judge court pursuant to 28 U.S.C. §2281, 2284.

A declaratory judgment could resolve no actual controversy as to the legal rights of the litigants. *See Golden*

v. Zwickler, 394 U.S. 103 (1969). As already noted, Defendant cannot be held liable for money damages under 42 U.S.C. §1983. Any claim by Plaintiffs for wrongful death is maintainable regardless of the validity of Article 1222. *See Howsley v. Gilliam,* 517 S.W.2d 531 (Tex. 1975). Moreover, Defendant, a Brenham police officer, hardly has an interest "of sufficient immediacy and reality" *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273, in defending the constitutional validity of Article 1222 to establish a "case or controversy" between the parties.

Further, Article 1222 is no longer the law in Texas. The new Texas Penal Code, effective January 1, 1974, substantially modifies the "justifiable homicide" provisions of the old Article 1222. The present Texas Penal Code's Section 9.42 authorizes the use of deadly force against another to protect land or tangible, movable property only when the actor reasonably believes deadly force is immediately necessary:

> (2)(B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property; and
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> (3) he reasonably believes that:
> (A) the land or property cannot be protected or recovered by any other means; or
> (B) the use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury.

These qualifications on the justification for use of deadly force materially alter the provisions of Article 1222. Thus, any declaratory judgment as to the constitutionality of

Article 1222 would be without significance as to any legal controversy between the parties, or as to the present law of Texas. Likewise, any injunctive relief would only restrain enforcement of a statute which is no longer the law. This Court may not issue an abstract decision involving no actual case or controversy. Plaintiff's claims for declaratory and injunctive relief must be denied.

There are no material facts in dispute, and Defendant is entitled to judgment as a matter of law. It is accordingly.

ORDERED, ADJUDGED and DECREED that Defendant's Motion for Summary Judgment be, and hereby is, GRANTED; that Plaintiffs take nothing; and that this action be, and hereby is, DISMISSED on the merits.

Entered at Austin, Texas, this 30th day of June, 1975.

JACK ROBERTS
United States District Judge